No. 12,044

IN THE

United States Court of Appeals

For the Ninth Circuit

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellant,

vs.

WALTER MCDONALD,
Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, discharging the appellee from the custody of the appellant. (Tr. 29-50.) Judge Denman (now Chief Judge) entertained the habeas corpus proceedings under the provisions of Title 28 U.S.C.A., Sections 451 to 461, inclusive.

Jurisdiction to review the order of Judge Denman discharging the appellee from the custody of the appellant is now conferred upon this Court by Title 28 U.S.C.A., Section 2253, but at the time the notice of appeal was filed herein such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below discharging appellee from the custody of appellant. (Tr. 29-50.) The appellee, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. 2-6), and thereafter an amended petition for writ of habeas corpus was filed (Tr. 13-19), in which it was alleged, in substance, that appellee was denied his constitutional right of effective assistance of counsel before the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called "the trial Court", and that accordingly his case was governed by the decision of the Supreme Court of the United States in *Glasser v. United States,* 315 U.S. 60, and he was therefore entitled to his discharge from the custody of the appellant, the Warden of the said penitentiary. Judge Denman issued an order to show cause (Tr. 7-8), and the appellant filed a return to order to show cause. (Tr. 21-29.) On the hearing on the order to show cause an amended petition for writ of habeas corpus was filed by appellee, as above indicated (Tr. 13-19), upon which the writ was issued. (Tr. 20 and 8-9.) Appellant filed a return to the writ (Tr. 10-12), and it was stipulated that the amended petition would be deemed appellee's traverse to the return to the writ. (Tr. 54.) Hearing on the writ was had, and the matter was then submitted. (Tr. 53-69.) Thereafter Judge Denman concluded that appellee had been denied the assistance of counsel before the trial Court as contemplated by the *Glasser*

case, supra, and entered his opinion and order discharging the appellee from the custody of the appellant. (Tr. 29-50.) From the order discharging the appellee from his custody the appellant appealed to this Honorable Court. (Tr. 51.)

Prior to the institution of the instant proceedings appellee had filed three petitions for a writ of habeas corpus in which he also alleged that he was denied the effective assistance of counsel, two before the District Court of the United States for the District of Kansas, and one before the District Court of the United States for the Northern District of California. The Kansas Court in both proceedings before it, decided adversely to the petitioner, and on appeal the Court of Appeals for the Tenth Circuit, on July 26, 1940 (*McDonald v. Hudspeth,* 113 F. (2d) 984), and on June 17, 1942, (*McDonald v. Hudspeth,* 129 F. (2d) 196, certiorari denied 317 U.S. 665) affirmed the decisions of the lower Court. In the first proceeding the *Glasser case,* supra, was not before the Court since it was not decided by the Supreme Court until January 19, 1942, although in the second proceeding the applicability of the *Glasser case* was argued. In the Northern District of California, proceedings numbered 24885-S, reported at 62 F. Supp. 830, United States District Judge A. F. St. Sure on September 20, 1945, granted the petition holding the *Glasser case,* supra, to be applicable, and remanded the appellee to the jurisdiction of the trial Court for further proceedings, but on appeal this Honorable Court on August 30, 1946, *Johnston v. McDonald,*

No. 11,210, reported in 157 F. (2d) 275, certiorari denied 329 U.S. 795, reversed Judge St. Sure. Appellee also unsuccessfully sought relief by habeas corpus in the Northern District of California, in case No. 23,414-S, affirmed April 2, 1945, by this Honorable Court, *McDonald v. Johnston,* No. 10,882, 149 F. (2d) 768, but this proceeding is of no moment here since the issue raised therein was unrelated to the allegation of the denial of the effective assistance of counsel. The entire record of all of these aforementioned proceedings were incorporated by reference by appellant in his return to order to show cause (Tr. 21-26) as they were in appellant's return to the writ of habeas corpus. (Tr. 10-12.)

In the return to the writ appellant also incorporated by reference the transcript of record on appeal before the United States Court of Appeals for the Sixth Circuit in case No. 10,581, entitled *"Walter McDonald, Appellant, v. United States of America, Appellee"*. In this latter case the Court of Appeals for the Sixth Circuit, on March 1, 1948, ... F. (2d) ....., affirmed the judgment of the lower Court entered on May 15, 1947, denying petitioner's motion to vacate the judgment, on the ground that he was denied the effective assistance of counsel before the trial Court. During the hearing on the writ, Judge Denman took judicial notice of the memorandum opinion of Judge St. Sure, case No. 24,885-S, 62 F. Supp. 830, the opinion of this Honorable Court reversing Judge St. Sure, *Johnston v. McDonald,* 157 F. (2d) 275, No. 11,210 (Tr. 58-59), and the opinion of the

Court of Appeals for the Tenth Circuit, 129 F. (2d) 196. (Tr. 60.) During the hearing on the writ the appellee did not testify. (Tr. 68.)

The only evidence received by Judge Denman, pursuant to the stipulation between appellant and appellee, inclusive of the orders and opinions above referred to, of which Judge Denman took judicial notice, was all the evidence considered by Judge St. Sure in case No. 24,885-S, supra, the identical evidence from which this Honorable Court concluded that the decision of Judge St. Sure was erroneous. This evidence, all documentary, consisted of the following:

Deposition of the Trial Judge, the Honorable Edward J. Moinet (Petitioner-Appellee's Exhibit "A", Tr. 56 and 69-93);

Letter from the Michigan Bar Association to Appellee (Petitioner-Appellee's Exhibit "B", Tr. 57 and Supplemental Transcript, p. 1);

Deposition of defense attorney George F. Curran, and deposition of John W. Babcock, prosecuting attorney (Petitioner - Appellee's Exhibit "C", Tr. 57, 94-118, and 118-130);

Certified copies of record of the trial Court, including the indictment, docket entries, judgment, Alcatraz transfer order, Alcatraz record of Court commitment (Respondent-Appellant's Exhibit "A", Tr. 62-63, and 131-152).[1]

[1]All the exhibits offered by appellee were originally from the record in the Kansas proceeding, *McDonald v. Hudspeth*, on appeal, 129 F.(2d) 196. In addition to these documents likewise being found in the transcript of record in case No. 11210, 157 F.(2d) 275, on appeal from Judge St. Sure's decision in case No. 24885-S, they were also part of the record before the Supreme Court of the United

At the hearing on the order to show cause, and in his memorandum filed with his return to order to show cause (Tr. 27-29), the appellant unsuccessfully urged Judge Denman, as a Circuit Judge, not to entertain the instant petition, suggesting that in *Bowen v. Johnston,* 55 F. Supp. 340, Judge Denman himself had indicated that in the absence of any extraordinary circumstances it would be an interference with the orderly administration of justice for a Circuit Judge to entertain a petition for writ of habeas corpus before the prisoner had exhausted his remedy before the District Judges, that there were no such extraordinary circumstances present in this case in view of petitioner's past successful experience before a District Judge for the Northern District of California, the Honorable A. F. St. Sure. Appellant also urged at this point that Judge Denman should not once more relitigate the issue of the alleged denial of the effective assistance of counsel, arguing that while *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, no new issues were presented to justify the issuance of a writ as prayed for. During the hearing on the writ, appellant also insisted that the proceedings constituted an abusive use of the writ (Tr. 60), but Judge Denman found otherwise (Tr. 32), asserting that the instant petition presented "a ground on which the facts were known

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States in the October 1946 term, No. 637, in which certiorari was denied. Appellant's exhibit had originally been a part of the proceedings before Judge St. Sure in case No. 23414-S on appeal, 149 F.(2d) 768, later incorporated by reference in Judge St. Sure's proceedings No. 24885-S on appeal, 157 F.(2d) 275.

to petitioner at the time of the filing of the prior two petitions, but concerning which petitioner 'was unaware of the significance of [the] relevant facts'." (Tr. 30.)

QUESTION.

Was the appellee denied the effective assistance of counsel before the trial Court?

CONTENTION OF THE APPELLANT.

The answer to the above stated question is: No.

ARGUMENT.

At the outset appellant concedes that should this Honorable Court agree with him that Judge Denman by entertaining the instant petition had in fact violated the rule which he himself had approved in *Bowen v. Johnston,* supra, such a finding could afford him no redress because the controlling statute permits a Circuit Judge to entertain a petition for writ of habeas corpus even though the District Judges have been bypassed, as were United States District Judges Michael J. Roche, Louis E. Goodman and George B. Harris, by the appellee. Furthermore, if this Honorable Court should also feel that Judge Denman made an abusive use of the writ of habeas corpus by relitigating, as he did, the issue of the alleged denial

of the effective assistance of counsel, appellant must likewise admit, in view of the absence of the *res judicata* principle to habeas corpus proceedings, that the issuance of the writ was legally proper. Accordingly, appellant, as a strictly legal proposition, can not argue that because the Kansas District Court, the United States Court of Appeals for the Tenth Circuit, the trial Court, and the United States Court of Appeals for the Sixth Circuit, and this Honorable Court, had found that the appellee had not been denied his constitutional right of assistance of counsel, Judge Denman must so find. What the appellant does say, and with great emphasis, is this: If, as here, a Circuit Court, on the basis of certain evidence, decides that a prisoner has not been denied his constitutional right of assistance of counsel before the trial Court, a Judge of that same Circuit, be he a District Judge, or a Circuit Judge, not entertaining appellate jurisdiction, should not, with the same evidence before him in a subsequent proceeding, reach an entirely opposite conclusion, as Judge Denman has done.

Nothing has changed since this Honorable Court reversed the decision of Judge St. Sure. The Supreme Court has enunciated no new legal principles on this score since then. If, as appellant believes, and as this Court found, Judge St. Sure's decision was erroneous, then Judge Denman's decision is likewise erroneous, and it too should be reversed, particularly in light of the fact that in reaching their decisions both Judge St. Sure and Judge Denman relied for authority on the *Glasser case,* supra. This Honorable Court did not

find that the alleged grievances of appellee fell within the framework of the *Glasser case,* supra, when it decided Judge St. Sure was wrong. The gravamen of appellee's complaint seems to be that he had had a disagreement with his counsel, that he had preferred charges against him before the Michigan State Bar, that the Court had been informed that there was such a difference, but did not inquire as to its nature, and compelled appellee's trial to proceed.

Is the *Glasser case* applicable to our case at bar?

While the decision in the *Glasser case,* supra, seems to indicate that a defendant is entitled to effective assistance of counsel, it does not follow that the mere fact that he was represented by an attorney against whom he had preferred charges with the Grievance Committee of the State Bar, or that the trial Judge, being informed that there had been a difference between attorney and client, did not inquire into these differences, shows that he did not receive the effective assistance of counsel. In the *Glasser case* the Supreme Court took great pains to point out that Glasser was in fact deprived of competent and effective assistance of counsel by the Court's appointment of his counsel to represent another defendant. Instances occurring during the trial were referred to by the Court to illustrate the prejudice to Glasser through his attorney being required to represent two clients. There is nothing in the record here which shows that anywhere during his trial appellee was prejudiced by having to accept the services of his counsel, or that his attorney did not in fact defend him to the best of

his ability, or that he was injured by the Judge's alleged failure to make inquiry as to the nature of the disagreement between himself and his attorney.

Since Judge Denman has denounced McDonald's attorney, George F. Curran, charged him with deliberately giving false testimony (Tr. 34), suggested that Curran desired his client's conviction so that this conviction would be of assistance to him in defending himself at a malpractice hearing (Tr. 34-35), and inferred that no "self respecting attorney" would have done what he had done (Tr. 42), and since it also appears that the alleged dereliction of Mr. Curran was one of the grounds upon which Judge Denman predicated his decision, appellant calls the attention of this Honorable Court to the fact that the trial Judge who observed Mr. Curran in Court said that he represented his client in a "very masterful manner, as a good lawyer". (Tr. 82.) And in the case of *McDonald v. Hudspeth,* 129 F. (2d) 196, supra, on which appellant also strongly relied in urging Judge Denman not to retry the issue of the alleged denial of the effective assistance of counsel, an opinion of which Judge Denman himself took judicial notice (Tr. 60), the Court of Appeals for the Tenth Circuit also approved of Mr. Curran's conduct, a fact which Judge Denman admits, although he minimizes this approval by suggesting that if the Tenth Circuit Court of Appeals had certain testimony before it, such as he had, and its import had been properly presented and appraised, that Court would not have given its approval. (Tr. 46). Yet Curran's deposition, from which Judge

Denman drew such conclusion, was before the Court of Appeals for the Tenth Circuit, as were all the exhibits offered by the appellant and received in evidence in our case at Bar.

To be sure there are times when Mr. Curran's and Judge Moinet's testimony appear to differ, but appellant can not understand, and he says it very respectfully, how Judge Denman accepts as true certain statements made by attorney Curran, and then finds others to be false. For example, Judge Denman, in support of his assumption of what the Court of Appeals for the Tenth Circuit would have done under the circumstances of the instant case, relies on the truth of Curran when he says:

> "On the contrary, Curran's testimony before me is that he never filed a notice of appeal, although he felt the court had erred in rulings warranting the appeal." (Tr. 45, 46),

while at the same time, in asking this Honorable Court not to be controlled by its decision reversing Judge St. Sure he makes, among other things, a finding that he disbelieves Curran's statement that he had requested a continuance of Judge Moinet. (Tr. 42.)

Appellant has thus far in his argument made no mention of Judge Denman's conclusion that "the failure to secure a continuance was as much a denial of due process by the attorney as there was a denial of due process by the Court in *Powell v. Alabama,* 287 U.S. 45 * * *" (Tr. 43), for the reason that nowhere in his petition, or in his amended petition, did appellee claim that his counsel had failed to request

a continuance. As a matter of fact, the only allegation concerning the matter of continuance made by the appellee is in his original petition in these proceedings, where under oath he alleged the very opposite of what Judge Denman found on this score, when he, the appellee stated: "The following morning January 24, 1939, when Court convened attorney Curran made a motion for continuance so that he could prepare a defense"; (Tr. 4), which is the identical statement he also made under oath in his original petition before Judge St. Sure in case No. 24,885-S (*Johnston v. McDonald,* supra, No. 11,210, Tr. 4.)

In other words, is not Judge Denman, in making a finding that Curran did not request a continuance, also branding appellee, who, as above indicated, had sworn twice to the contrary, a perjurer? The question answers itself. Appellant can likewise only fruitlessly conjecture why in the amended petition, the original complaint with relation to the matter of the continuance was abandoned, but all this is immaterial because whether the attorney did or did not request a continuance, or whether he did request such a continuance and the trial Judge denied the request, under the circumstances present here, the appellee, it is respectfully urged, has not been deprived of due process,[2] as contemplated by *Powell v. Alabama,* supra, cited by Judge Denman.

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[2] "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact standing alone that a continuance has been denied does not constitute a denial of the assistance of counsel."
Avery v. Alabama, 308 U.S. 444.

During the course of this argument appellant has indicated that he relies strongly on the decision of this Court reversing Judge St. Sure. A reading of Judge Denman's opinion shows that he does not believe this Court would have decided as it did if the matter had been properly presented to it at that time. In his opinion Judge Denman says:

> "The Warden also relies on the decision of this Ninth Circuit in McDonald v. Johnston, 157 F. (2d) 275. There the court reversed the decision of District Judge St. Sure, who had ordered the petitioner's release and return to Michigan for further proceedings. The ground of the reversal is that the petition failed to state a cause for the writ. The petition was in the same confusion of intermingled allegations and incorporations of testimony as the original petition before me. Nowhere does it claim, as in the amended petition, that it was the failure of Curran to advise the court that his client was prosecuting him and that it was the failure of the court to make certain the nature of the disagreement which constituted the gravamen of the failure to create the constitutional court.
>
> "This is clearly apparent from the following statement at page 276, 'McDonald relies on Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680. There the trial court, over Glasser's objection, appointed an attorney whom Glasser had employed for himself as attorney for Glasser's co-defendant, whose interests conflicted with those of Glasser. In the case at bar, Attorney Curran was employed by both defendants (McDonald and Barnowski). No attorney

was appointed for either of them. It was not claimed or suggested that their interests conflicted. Hence the Glasser case has no relevancy here.'

"If this is what the petition before that court presented as its ground for relief, that decision is correct. The exact contrary appears in the amended petition before me. No contention is here made of a conflict of interest between petitioner and his co-defendant. As stated, the Glasser case is controlling because of a deeper adverse interest between attorney and client, a personal interest of the attorney under prosecution by his client." (Tr. 46-48.)

But was the petition before Judge St. Sure, or the original petition in our case at bar "a confusion of intermingled allegations"? It is obvious that the answer to that question will be found in the petition itself before Judge St. Sure, a petition identical with the original petition filed before Judge Denman, the pertinent part of which reads as follows:

"The following morning January 26, 1939, when court convened Attorney Curran made a motion for a continuance so that he could prepare a defense; for at no time preceding the trial date had this said attorney notified or consulted with petitioner in an effort to prepare a proper structure of defense. This motion the court denied. Ex. C. p. 15, lines 21 to 26.

"Whereupon petitioner arose and personally requested Judge Moinet in open court for other and unprejudiced counsel. Ex. A. p. 3, line 24; Ex. C. p. 7, line 24; Ex. C. p. 20, line 28. He explained that this attorney, at that instant, was

awaiting trial before the grievance committee of the Michigan State Bar, Ex. B, for professional misconduct; and that petitioner was the prosecuting witness. Ex. C, p. 14, line 12.

"This urgent request the court denied, Ex. C, p. 15, line 17, compelling petitioner to proceed to trial with his personal enemy simulating a defender and without having made any preparation whatsoever for a defense. Ex. C, page 15, lines 21 to 26." (Transcript of Record in C.C.A. 9 case No. 11,210, pages 4 and 5.)

Appellant emphasizes that the petition was drawn with sufficient clarity to cause Judge St. Sure to grant appellee relief, and fundamentally the issue therein was the same as the issue before Judge Denman, an allegation that the petitioner had complained to the Court about his counsel, that he had filed charges against him with the Bar Association, and that the trial Judge did not make an inquiry concerning the matter. Judge St. Sure's findings of fact in this connection are extremely significant, for he said, in ordering the prisoner's discharge:

"Undisputed facts show that at the trial after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939, and dismissed.

"Petitioner contends that his case is governed by Glasser v. United States, 315 U.S. 60." (Transcript of Record in C.C.A. 9 case No. 11,210, page 73.)

It is also significant that Judge St. Sure in granting the prisoner the relief for which he prayed did so on the following grounds:

"Here we have a layman charged with a serious crime who informs the court that he has had differences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald) Glasser is disclosed by the record before us.'

"Applying the ruling in the Glasser case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the 'requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.' Johnson v. Zerbst, 304 U.S. 458, 468." (Transcript of Record in C.C.A. 9 case No. 11,210, page 77.)

We must also not lose sight of the fact that after the petition had been filed before Judge St. Sure he appointed to represent the appellee very able and very competent counsel, Wayne Collins, Esq., an attorney who has appeared with distinction before this Honorable Court as well as before the District Court on many occasions, and it was Mr. Collins who not only appeared for appellee before Judge St. Sure, after the petition had been filed, but also on appeal before this Court, in *Johnston v. McDonald,* supra. (Tr. of Record, C.C.A. 9, No. 11,210, page 72 and page 1.)

Judge Denman speaks of certain allegations made in the amended petition which were not made in the original petition, allegations which he stated considerably strengthen the case of the appellee. But mere allegations in a petition, controverted, of course, by the appellant in his returns, are not evidence. The only evidence that appellant respectfully suggests can be considered by the Court are the exhibits already referred to.

Is this Court to sustain Judge Denman and disregard its decision reversing Judge St. Sure for the reason, as Judge Denman insisted, that the matter was not properly presented, or because petitioner, to quote Judge Denman's own words, "was unaware of the significance of the relevant facts"? (Tr. 30.) Appellant hopes not.

Appellant has said, and appellant repeats, because he considers it important, that there is a difference

between allegations in a petition or an amended petition, and evidence. For example, Judge Denman says that the following facts are "undisputed" (Tr. 32):

> "Although petitioner was entitled to believe that his charges against Curran terminated any prior relationship of attorney and client, Curran, without advising petitioner, on January 10, 1939, entered his appearance as petitioner's attorney for his defense under the indictment under which he was subsequently convicted." (Tr. 33.)

Bearing in mind that appellee did not himself testify before Judge Denman (Tr. 68), where is there any evidence that appellee believed that the relationship between himself and Curran had terminated as of the date the charges had been preferred before the Bar Association? If this be so, why the delay of the appellee in making his complaint to the trial Judge until after the jury had been impaneled, until after jeopardy had attached? Where, too, is there evidence to support this finding of Judge Denman: "From Curran's false statements that he 'could not * * * ask to be discharged from the case,' "? (Tr. 34.) Where is there any evidence that these particular statements are false? Where is there any evidence to support the assertion that this finding is "undisputed"?

Logically now, the next question is: What is the exact basis on which Judge Denman ordered the appellee's discharge? In one part of his opinion he says:

> "His petition before me was amended so that it states for the first time the later realized rea-

> sons and facts showing the failure to constitute a constitutional court for the trial in which he was convicted—particularly for the first time realizing that the duty of *his attorney* to tell the court the powerful interest of the attorney adverse to petitioner which made it clear that the attorney was disqualified to represent him. Once stated, the defect in the court protrudes like the 'sore thumb' of colloquial speech." (Tr. 32.)

From this statement one might infer that if there was a disagreement between attorney and client, a powerful disagreement, the client could not possibly be given the effective assistance of counsel. But thereafter Judge Denman seems to qualify this position by stating:

> "This does not mean that whenever the court at the beginning of a trial is told a dispute exists between an accused and his attorney that there must be a continuance and a substitution of another attorney. It means no more than that the judge must inquire into the nature of the dispute, as Judge Moinet says he would have done." (Tr. 41.)

From this latter observation made by Judge Denman, the conclusion might be logically drawn that in his opinion the gravamen of the wrong is the failure of the trial Judge to "inquire into the nature of the dispute." This conclusion is strengthened by the fact that immediately after making this observation he declares:

> "This is what was done by the trial Judge in United States v. Gutterman, 147 F. 2d 540

(C.C.A. 2), where Judge Augustus Hand's opinion sets forth all the colloquy showing the nature of the differences between the attorney and client and upheld (Judge Frank dissenting) the trial court's continuance of the trial with that attorney. Similarly the full evidence was stated in United States v. Mitchell, 138 F. 2d 83 (C.C.A. 2)." (Tr. 41.)

Appellant has carefully read both of these decisions. In the *Gutterman case,* supra, the trial Judge did make inquiry as to the nature of the disagreement between the attorney and client, but nowhere in this case is there a finding that if such inquiry had not been made the decision of the lower Court would have been reversed. In the *Mitchell case,* supra, however, appellee has been unable to find where such inquiry was made as Judge Denman suggests. In that case, 138 F. (2d) 831,[3] it was said by Circuit Judge Clark:

> "But we do feel that the court was too hasty, in view of the circumstances here presented, *in stopping the defendant so quickly and, indeed, in not inquiring as to whether there was any reason for the demand.*
>
> "A majority of this court nevertheless feel that no reversal should result, because the complete transcript now presented to us discloses both what was motivating the defendant and the fact that in reality the trial cleared up his objection." (Italics supplied.)

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[3]Judge Denman, in his opinion, has inadvertently cited *United States v. Mitchell* as appearing at 138 F.(2d) 83, instead of at 138 F.(2d) 831, where the opinion is actually reported.

Judge Clark then went on to make this statement, at page 832, which we believe is particularly appropriate for our case at bar:

> "After all, a trial should be viewed practically with the purpose of discovering if the ends of justice have actually been achieved. Had the court permitted defendant to make his explanation, the matter of the diary would have been cleared up that much earlier in the day; but it is hardly conceivable that any other result would have followed. With that point as to the diary disclosed and taken care of the court would certainly have discouraged defendant from following the wellnigh suicidal course of attempting to go on with the case alone. His substantial rights having been actually protected reversal is not justified. 28 U.S.C.A. § 391."

From this language in the *Mitchell case,* we see that not only was no inquiry made by the trial Court herein concerning the difference between attorney and client, but we also see that the test of whether there has been a denial of a substantial right warranting reversal under Title 28 U.S.C.A. Section 391 is what happened during the trial and whether the reason giving rise to the disagreement was such that it could and would prevent a fair trial. Certainly, if Judge Moinet had made an inquiry and determined that the dispute about which appellee complained to the Bar Association was over the sum of $25.00, which appellee claims was paid to Curran for the purpose of filing of a habeas corpus petition before the trial Court, and which Curran says was

largely paid him as traveling expenses for visiting the appellee while he was imprisoned in a jail in a city other than that in which Curran resided, he would not have, appellant believes, continued the case and appointed new counsel for appellee, or given him time to secure new counsel. Judge Moinet himself suggested that to warrant such action on his part the grievance would have to have been a serious one when he declared in his deposition:

> "If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and *if I had been satisfied that their difficulties were of such a nature that in my opinion the counsel could not proceed fairly,* solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel." (Italics supplied.) (Tr. 75-76.)

Let us also not forget that Judge Moinet in his deposition had previously stated that McDonald himself had told him after the jury was drawn and sworn that he had had some *little disagreement with his attorney.* Here we quote verbatim from the record:

> "Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?
>
> A. Shortly after the case was called, and, if I mistake not, the jury was drawn and sworn, McDonald said that he had some little disagreement with his attorney." (Tr. 72.)

Judge Denman indicated that in his opinion the dispute between Curran and McDonald was much

more serious than the differences between attorney and client in the *Gutterman case* and in the *Mitchell case, supra,* when he states:

> "In neither case was the difference on where the client could feel that if he were convicted his attorney would be greatly aided in defending his client's malpractice proceeding against him." Tr. 41.)

With this appellant must very respectfully disagree. To him the disputes between attorney and client in the *Gutterman* and *Mitchell cases,* supra, are much more marked than in our case at bar. In any event there is no authority for the proposition that if an attorney who has had sharp disagreement with his client represents him in the trial of the case such representation of itself constitutes a denial of the effective assistance of counsel.

In his opinion Judge Denman also says:

> "The Warden contends that the Glasser case requires that, despite such disqualification, something more in the way of prejudice must be shown in the preparation for or in the conduct of the trial. In this I cannot agree." (Tr. 41.)

Appellant does not say that the disagreement between McDonald and Curran constituted a disqualification of Curran, but substituting the word disagreement for the word disqualification appellant does say once more that there must be some prejudice shown in the preparation for, or in the conduct of, the trial before the appellee can consider himself aggrieved. Here it should be mentioned that Curran was familiar

with McDonald's case, having appeared on his behalf some time before the trial at an arraignment on the complaint before Judge Moinet, sitting as a commissioner in the absence of the regular commissioner who was ill. (Tr. 73.)

In *Noble v. Eicher* (C.C.A. D. C.), 143 F. (2d) 1001, the Court seemed to hold that whether there has been a denial of the effective assistance of counsel must be determined by what occurs during the trial, and not by what might have occurred. This likewise seems to be the holding of this Honorable Court in *Danziger v. United States,* 161 F. (2d) 299, at page 301, an opinion written by Judge Healy in which Judge Denman and Judge Orr concurred:

> "There was, however, no showing or appearance of prejudice to Danziger growing out of the appointment of his attorney to represent the corporations. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, is relied on, but the circumstances of that case were markedly different. In addition, the court made the appointment contingent on future developments and told counsel that he would be relieved from the assignment if conflict became apparent. The matter was not again brought up and no further objection on that score was urged at any stage of the trial."

Perhaps this whole case should be resolved in the light of what the Court of Appeals for the District of Columbia said in *Dorsey v. Gill,* 148 F. (2d) 857, at page 876:

"Everyone who is acquainted with the realities of practice knows the desire of some convicted persons to have their cases tried over again and their frequent repudiation of counsel after their hopes for acquittal or for lenient punishment have failed to materialize. It is easy for such a person to rationalize his own wishful thinking—together with hopeful comments of counsel—into a structure of promises, coercion and trickery; to assume incompetency and disinterest or worse, upon the part of counsel. But mere general assertions of incompetency or disinterest do not constitute a prima facie showing required by the statute to support a petition for habeas corpus. District attorneys and assigned counsel are officers of the court; licensed to practice, upon proof of character and fitness to perform professional duties. There is a presumption of proper performance of duty by each of them, which requires much more than the allegations of the present case to set the procedure of habeas corpus in motion."

In the final analysis, however, in asking this Court to reverse Judge Denman, nothing is of greater importance than what this Court said in *Johnston v. McDonald,* 157 F. (2d) 275, in reversing Judge St. Sure, at page 276:

"In this (his fourth) habeas corpus proceeding, McDonald petitioned for the writ on the ground that his sentence was void because, at his (and Barnowski's) trial, he was denied the assistance of counsel for his defense. Attached to and made part of the petition were copies of three depositions—a deposition of District Judge Edward J. Moinet, who presided at the trial, a depo-

> sition of Assistant United States Attorney John W. Babcock, who prosecuted McDonald and Barnowski, and a deposition of Attorney George F. Curran, who defended them. Instead of showing that McDonald was denied the assistance of counsel for his defense, the depositions (which were part of the petition) showed that there was no such denial. Thus it appeared from the petition itself that McDonald was not entitled to the writ. Hence the petition should have been denied."

Of significance is the fact, and we say it once more, that this Honorable Court had before it in reaching its decision the deposition of Judge Moinet, the deposition of the prosecuting attorney, John W. Babcock, and particularly the deposition of the appellee's attorney, George F. Curran, from which it was concluded, as above set out: "Instead of showing that McDonald was denied the assistance of counsel for his defense, the depositions (which were part of the petition) showed that there was no such denial."

In closing this argument appellant would leave with this Honorable Court two pronouncements, the one in *Diggs v. Welch,* 148 F. (2d) 667, certiorari denied 325 U.S. 889:

> "Denial of effective assistance of counsel means representation so lacking in competence that it becomes the duty of the court to observe it and correct it."

and the other by Mr. Justice Frankfurter in his dissenting opinion in the *Glasser case,* supra, at page 88:

"It is a commonplace in the administration of justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record."

CONCLUSION.

In view of the foregoing, it is respectfully urged that this Court should again conclude that the appellee was not denied his constitutional right of assistance of counsel before the trial Court, and that the order of discharge should be reversed, and the case remanded to Judge Denman with directions that he enter a judgment denying the appellee the relief for which he prayed.

Dated, San Francisco, California,
December 30, 1948.

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